No. 93-1631

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY, *ET AL.*,

*Petitioners,*

v.

THE COORS BREWING COMPANY,

*Respondent.*

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* SUBMITTED BY THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

I. Does the government's regulation of alcohol content figures on beer and other malt beverage labels comport with the free speech provision of the First Amendment of the Constitution?

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## BRIEF OF *AMICUS CURIAE* SUBMITTED BY THE CENTER FOR SCIENCE IN THE PUBLIC INTEREST IN SUPPORT OF PETITIONERS[1]

## STATEMENT OF INTEREST

The Center for Science in the Public Interest (CSPI) is a non-profit consumer health organization founded in 1971. CSPI is located in Washington, DC, and is supported by 750,000 members, foundation grants, and the sale of educational publications. The goals of CSPI are to educate the public on health issues, to improve federal and state health policies, and to monitor trade practices that adversely affect the public health and welfare.

[1] CSPI has gained the consent of all parties to file as *Amicus Curiae*. The letters of consent are being submitted to this Court with the original copy of this brief.

CSPI's interest in alcohol labeling dates back to 1972 when we first requested the Bureau of Alcohol, Tobacco and Firearms (BATF) to include ingredient information on alcoholic beverage labels. In 1981, CSPI commenced litigation under Section 5(e) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e) to achieve this goal. CSPI's efforts have resulted in partial ingredient disclosures on alcoholic beverage labels. *See CSPI v. Treasury*, 573 F. Supp. 1168 (D. D.C. 1983); *appeal dismissed*, 727 F.2d 1161 (D.C. Cir. 1984).

Also, in 1981, CSPI formed the Alcohol Policies Project to spearhead our efforts to improve policies regarding alcoholic beverages. In 1983, the Project's report, *The Booze Merchants*, touched off a national debate on the labeling and advertising of alcoholic beverages. In 1988, the Project led a coalition that successfully campaigned for federal legislation to require health and safety warning labels on all alcoholic beverages. *See* 27 U.S.C. § 215. In recent years, CSPI has become particularly concerned about the impact of drinking on young Americans and has favored disclosure of information pertaining to alcohol consumption and health in advertising.

As is evident, CSPI favors the inclusion of increased consumer information on alcoholic beverage labels and in advertising.[2] However, in 1989, CSPI filed an *amicus curiae* brief with U.S. Court of Appeals for the Tenth Circuit in this case urging that the court uphold the constitutionality of Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), which prohibits the disclosure of alcohol content on beer labels. We take this position because the disclosure of alcohol content in the manner that Coors believes is its constitutional right is inherently misleading and irresponsible.

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[2] CSPI also led a coalition of organizations that urged Congress to enact the Nutrition Labeling and Education Act of 1990, 21 U.S.C. 403(q), which requires nutrition information on all food labels regulated by the Food and Drug Administration.



CSPI is highly interested in the issues before this Court and our members will be directly affected by the outcome of this Court's decision. We hope and believe that this Court will profit from the knowledge and expertise that we can bring to bear on the issues presented here.

## STATEMENT OF FACTS

CSPI adopts the Petitioner-Government's statement of facts by reference.

## SUMMARY OF THE ARGUMENT

CSPI generally favors the provision of consumer information on food and beverage labels. However, we believe that the Tenth Circuit's decision that permits Coors to tout the alcohol content of beer on labels must be overturned for at least four reasons:

1) Simply placing the percentage of alcohol by *volume* on beer labels would be an inherently misleading half-truth and hence not constitutionally protected, because beer would appear deceptively low in alcohol compared to wine and liquor.

2) Under the Constitution, the government has a substantial interest in prohibiting alcohol content labeling. One of Coors' admitted reasons in originally bringing this case is to use alcohol content labeling to dispel Coors' image of being a "weak" beer. Disclosure of alcohol content in the manner that Coors seeks will lead to an irresponsible "horsepower race" among Coors and other brewers based on alcohol content and will exacerbate societal problems relating to alcohol abuse, particularly among young people.

3) The Tenth Circuit held incorrectly that the government did not adequately support its finding that the prohibition of alcohol content labeling directly advanced the government's interest in preventing a "horsepower race" among brewers. Since the Tenth Circuit's decision (and the issuance of an

interim government regulation permitting alcohol content labeling that was made necessary by that decision) *an actual "horsepower race" has started among brewers, just as the government predicted.* The Tenth Circuit's decision thus ignores well-accepted observations about the alcoholic beverage marketplace and poses a serious threat to the entire body of administrative law which allows regulatory agencies to act on the basis of agency expertise.

4) The position urged by Coors threatens other essential consumer protection laws and regulations that prohibit the disclosure of a variety of information in order to achieve important governmental interests.

## ARGUMENT

The issue in this case is whether the limitation of commercial speech in section 5(e)(2) of the Federal Alcohol Administration Act (FAAA), 27 U.S.C. §205(e)(2), is constitutionally valid. The Supreme Court has articulated a four-part test to determine the validity of commercial speech limitations. *See Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989).

### I. THE ALCOHOL CONTENT FIGURES THAT COORS SEEKS TO INCLUDE ON BEER LABELS ARE INHERENTLY MISLEADING AND THUS NOT ENTITLED TO ANY FIRST AMENDMENT PROTECTION.

First, it must be determined whether the speech in question qualifies for First Amendment protection. *Central Hudson,* at 566. Commercial speech is protected only if it concerns a lawful activity and is not false or misleading. *Id.* The alcohol content figures that Coors wants to tout on beer labels are not protected



by the First Amendment because such figures are inherently misleading half-truths. While technically true, such labeling would deceptively make beer appear to be less intoxicating than wine and liquor when in fact beer is not.[3] Beers, which range from approximately 3.2% to 5% alcohol by *volume*, would appear lower in alcohol when compared to wines or liquor (which range from approximately 11% to 75% alcohol by *volume*). Yet, an average *serving* of beer is not lower in alcohol than an average *serving* of wine or liquor.

According to the *Dietary Guidelines For Americans*, published jointly by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture, one can of beer (12 oz.) is equal in total alcohol content to a glass of wine (5 oz.) and to a mixed drink (1.5 oz. of 80 proof distilled spirits).[4] As the provision of this information in the *Dietary Guidelines* indicates, many consumers do not realize that one serving of each of these beverages contains the same amount of alcohol. Thus, there is a great potential for consumer deception and manipulation, the very problem the FAAA seeks to prevent. Such speech does not deserve constitutional protection.

In its original decision, the Colorado District Court found it difficult to see how a truthful statement regarding alcohol content can be misleading. Reporter's Transcript of Hearing for Summary Judgement, *Coors v. Baker*, No. 87-Z-977 (D. Colo. 1989) at 50. In fact, courts have repeatedly found that literally truthful statements can have misleading and deceptive implications. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (Attorney adver-

[3] The Speaker and Bipartisan Leadership Group of the U.S. House of Representatives originally argued in the Colorado District Court that alcohol content labeling is inherently misleading, *see Coors v. Brady*, 944 F.2d 1543, 1547 (10th Cir. 1991). It is unclear why the House did not pursue this position.

[4] United States Departments of Agriculture and Health and Human Services, *Dietary Guidelines for Americans* 23 (1990) (*see* Appendix A-3).

tising on a contingency-fee basis, which waives legal fees but not court costs, was misleading since consumers would perceive no bill would accrue unless they win); *Kraft v. FTC*, 970 F.2d 311 (7th Cir. 1992) (Kraft's claim that each slice of cheese has 5 ounces of milk, while true, was misleading since much of the calcium found in milk is lost during processing); *Ibanez v. Florida Department of Business and Professional Regulations*, 114 S. Ct. 2084, 2091 (1994); *Thompson Medical v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); *Renovation Int'l Corporation v. FTC*, 111 FTC 206, 292-295, *aff'd* 884 F.2d 1489 (1st Cir. 1989).

The District Court's uninformed pronouncement also flies in the face of traditional consumer protection statutes enacted by Congress. For example, under the Federal Food, Drug and Cosmetic Act, the Food and Drug Administration has prohibited food labels from listing fat content as a percentage of weight. Thus, the statement "contains five percent fat" on a processed food label is prohibited if the statement implies that the food is low in fat when in fact it is not.[5] Similarly, in this case, a beer label that states "contains 4.5% alcohol by volume" implies that the beer is low in alcohol when in fact a serving of beer contains as much alcohol as a shot of whiskey.

The statements that Coors wishes to include on beer labels are thus inherently misleading half-truths and not deserving of any constitutional protection.

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[5] 21 CFR § 101.62(b)(3)(i). The claim is prohibited unless the food meets the FDA's definition of "low fat." *Id.*



## II. REGULATION OF ALCOHOL CONTENT LABELING IS CONSTITUTIONALLY VALID BECAUSE THE INCLUSION OF SUCH FIGURES ON BEER LABELS WOULD LEAD TO UNFAIR AND IRRESPONSIBLE COMPETITION BASED ON ALCOHOL STRENGTH.

Assuming that the disclosure of alcohol content by volume is not misleading, BATF's regulation of alcohol content labeling is still constitutional. This Court has consistently held that even truthful, non-misleading commercial speech may be prohibited whenever the prohibition serves a substantial governmental interest, directly advances that interest, and constitutes a reasonable fit between the prohibition and the interest served. *Fox*, 492 U.S. at 480. In this case, the original interest advanced by the statute — to prevent reckless, unfair competition based on alcohol strength — remains important today and is directly advanced by the sections of the law under attack by Coors. Furthermore, there is a reasonable fit between the restraints on speech and the government's interest that is being served. Congress can thus legitimately prohibit alcohol content labeling even if it is truthful and non-misleading.

### A. The Governmental Interest in Regulating Alcohol Content Labeling is Substantial.

The Tenth Circuit held correctly that the government's interest in preventing "horsepower races" among brewers was substantial. *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547-49 (10th Cir. 1991) (hereinafter *Coors I*).

Congress was profoundly concerned with the alcoholic beverage industry's propensity to use alcohol content to compete unfairly. Federal Alcohol Control Act, S. Rep. No. 1215, 74th Cong., 1st Sess. § 2 (1935).[6] Furthermore, Congress found

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[6] Liquor control legislation has as its primary aim the protection of public welfare by preserving health. Singer, 3A *Sutherland Stat. Const.* § 71.03, at 244 (5th ed. 1992). The goal of the FAAA was to protect public

that the previous uses of alcohol content on labeling were nothing more than *"attempts to take advantage of consumer ignorance."* *Id.* (emphasis added). Accordingly, Congress concluded that "[m]alt beverages should not be sold on the basis of alcoholic content." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12-13 (1935), *reprinted in Legislative History* at 68.

The practices that sparked this congressional action sixty years ago are still a serious concern today. As discussed openly in trade press reports, consumers think Coors beer tastes more watery than other beers. This has led to Coors beer being nicknamed "Colorado Kool-Aid".[7] Coors admitted at oral argument that it desires to state the alcohol content of its products to dispel Coors' image of being a "weak" beer. *Coors I*, 944 F.2d at 1549.[8] The Tenth Circuit erred in its reasoning when it stated that Coors' admission does not show that the company is likely to engage in a strength war because Coors could "overcome this mis-perception by simply publishing the percentage of alcohol content on the label." *Adolph Coors Co. v. Lloyd Bentsen*, 2 F.3d 355, 359 (10th Cir. 1993) (hereinafter *Coors II*). Even if Coors could achieve its marketing objectives by simply listing

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health and to prevent unfair competition in the alcoholic beverage industry. Office of the General Counsel, Federal Alcohol Control Administration, *Legislative History of the Federal Alcohol Administrtaion Act: Public Law No. 401, Seventy Fourth Congress, H.R. 8870* (1935) (*Legislative History*).

[7] *Brewing Up Trouble*, Advertising Age, July 27, 1987, at 16 (*see* Appendix B; Hume, *Coors Fights Label Restriction*, Advertising Age, July 13, 1987, at 27 (*see* Appendix C).

[8] In an article published six months after Coors filed its original complaint, Robert Rechholtz, Coors Executive Vice President of Sales and Marketing, specifically announced that Coors wanted to use alcohol content information to advise consumers that Coors beer contains just as much alcohol as beers produced by Anheuser Busch, a competitor of Coors. Goeken, *Listing Alcohol in Beer Near*, Rocky Mountain News, Dec. 27, 1987, at 73 (*see* Appendix D).



alcohol content without increasing the strength of its beer, other brewers might respond to Coors' rehabilitation of its image by increasing the alcohol content of their beers and listing such information on labels.[9]

Moreover, a Coors advertisement indicates that the Tenth Circuit deemed Coors' stated reasons to be too virtuous. A Coors advertisement indicates that the company is indeed inclined towards marketing beer as an intoxicant. A "jingle" for "Coors Extra Gold" states:

> You know I like my beer, I like it a lot.
> *Drink it down to the bottom.*
> *Start again at the top...*
> Pour that gold and give me some space,
> 'cause when I'm drinking my brew I got no time to waste.
> Gonna taste that Extra Gold taste and
> *Pour it into my face.*

(*see* Appendix E, emphasis added). These statements are accompanied by fast-paced rock music. Encouraging people to "drink it down to the bottom, start again at the top" and to pour beers into their faces is not a responsible way to market beer, particularly when such a message is set to rock music — the genre of choice among young people.

Beer is the alcoholic drink of choice of under-age drinkers.[10] Disturbing proportions of young people engage in heavy drinking practices that may become more dangerous if their preference for higher-alcohol beer is facilitated by alcohol content labeling. Over 40% of all college students[11] and 28% of

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[9] Coors has admitted the possibility that strength wars could arise as a result of alcohol content labeling. Brief for Plaintiff/Appellee at 31-32, *Coors I*, 944 F.2d 1543.

[10] Office of Inspector General, Department of Health and Human Services, *Youth and Alcohol: A National Survey 7 (1991)*.

[11] Center on Addiction and Substance Abuse at Columbia University, *Rethinking Rites of Passage: Substance Abuse on America's Campuses* 14 (June 1994)(hereinafter CASA).

high school seniors report binge-drinking (five or more drinks at a time) in the last two weeks.[12] One in three college students now drinks primarily to get drunk.[13] Alcohol-related traffic crashes are a leading cause of death among persons aged 15-24 years.[14] Alcohol has also been identified as a major factor in campus rapes, transmission of sexually transmitted diseases, including AIDS, school failures, and campus vandalism.[15] The government's fear of "strength wars" takes on flesh and blood, and often life and death importance for this population of heavy beer-drinking young people.

Responsible members of the advertising industry are hostile to Coors' effort to use alcohol content disclosures to tout the strength of its products. In an *Advertising Age* editorial concerning this case, one industry observer commented:

> We find it a little hard to believe that the reason Adolph Coors Co. wants to change a law that bars brewers from listing alcohol content is so it can advertise its beer as "a beverage of moderation." . . . Other brewers have opposed listing of alcohol content on the basis that it might result in a race to see who can brag about more alcohol than the other guy . . . One competitor suggests that Coors' real purpose in its court challenge of the law is to be able to show that its alcohol content is on par with or ahead of other leading beers, to dispel Coors' image as "Colorado Kool-Aid."[16]

[12] L. Johnson, *Monitoring the Future Survey*, (NIDA) U. of Mich. Inst. Soc. Res., Table 1 (January 1994).

[13] CASA, *supra*, at note 11.

[14] Luis G. Escobedo, *Drinking and Driving Among US High-School Students*, The Lancet, Feb. 12, 1994, at 421.

[15] CASA, *supra* at note 11.

[16] *Brewing Up Trouble*, Advertising Age, July 13, 1987, at 16 (Appendix B).



The Tenth Circuit found correctly that the government's authority to prohibit alcohol content information in *advertising* was constitutional, *see* Section 205(f)(2) of the FAAA. However it overlooked the District Court's decision to ignore the fact that pictures of beer *labels* routinely appear in beer advertising. Reporter's Transcript of Bench Ruling, *Coors v. Brady*, No. 87-Z-977 (D. Colo. 1992) at 5. Thus, under the Tenth Circuit's decision, Coors would be free to promote the strength of its beer in advertising by simply depicting a picture of its beer label in advertisements.

It is sadly ironic that at a time when problems relating to alcohol are so severe, Coors wishes to market beer on the basis of alcoholic strength. Beer is the predominant source of alcohol consumed in America, accounting for 54% of all alcohol consumed in 1990.[17] Alcohol is a factor in approximately 105,000 deaths each year.[18] The alcohol-related death toll on our highways is well known. Alcohol is estimated to cause between 3% and 10% of all deaths, including 60% to 90% of cirrhosis deaths, 16% to 67% of home injuries, drownings, fire fatalities, and job injuries, and 3% to 5% of cancer deaths.[19]

Alcohol affects practically every organ in the body and causes brain damage, liver cirrhosis, birth defects, heart disease, and cancers of the liver, mouth, throat, esophagus, and larynx when consumed in sufficient quantity.[20] In 1990 alcohol problems cost society $100 billion.[21] Some 76 million Americans

[17] National Institute on Alcohol Abuse and Alcoholism, *Surveillance Report #23 - Apparent Per Capita Alcohol Consumption: National, State, and Regional Trends, 1977-1990*, 16 (1992).

[18] Michael J. McGinnis, *Actual Causes of Death in the United States*, 270 J. Am. Med. Ass'n 18 (November 10, 1993).

[19] *Id.*

[20] *Id.*

[21] D.P. Rice, et al., *The Economic Costs of Alcohol and Drug Abuse and Mental Illness: 1985*, Institute on Alcoholism and Aging (*revised* December 1992).

are affected by alcohol abuse at some time.[22] Accordingly, this is no time for Coors or any other brewer to encourage consumption of products based upon their alcohol content.

Congress retains a substantial interest in maintaining Section 5(e)(2) of the FAAA, especially considering that Coors is on record as wanting to engage in marketing practices that would lead other brewers into an alcohol content "horsepower race" despite the growing public concern over alcohol abuse among young people. It is clearly established that an interest in the health, safety, and welfare of the citizenry constitutes a substantial government interest. *Posadas*, 478 U.S. at 341. Also well established is the government interest in prohibiting commercial speech related to alcohol in order to reduce the harm alcohol causes. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500 (10th Cir. 1983), *Dunagin v. City of Oxford, Miss.*, 718 F.2d. 738 (5th Cir. 1983).

### B. The Regulation of Alcohol Content Labeling Directly Advances the Government's Interest.

#### 1. *The Tenth Circuit erred by holding that the government must make an empirically precise showing under Edenfield v. Fane.*

This is a case where Congress has sought to alleviate a serious public health problem through a restriction of commercial speech. The Supreme Court has concluded that a legislature may reasonably presume that prohibitions of commercial speech are effective in reducing the incidence of an activity that is injurious to the public welfare. *Posadas*, 478 U.S. at 343-45. Furthermore, in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981), this Court ruled that the "accumulated common sense judgments" of the legislature should not be overturned

[22] McGinnis, *supra* note 18.



unless they are "manifestly unreasonable." *Id.* at 509 (plurality opinion).[23]

The third prong of the *Central Hudson* test does not require an empirically exact government showing if the prohibited speech concerns the sale of products associated with substantial societal harms. Rather, it provides that the regulation of commercial speech may not be sustained if it provides only "ineffective or remote support for the government's purpose . . . ." 447 U.S. at 564. As interpreted in *Posadas*, the majority found a duly sufficient constitutional "link" based on what the legislature of Puerto Rico "obviously believed," a finding the Court characterized as a constitutionally "reasonable one" in these kinds of cases. 478 U.S. at 341-342. Implicit in this Court's statements and its holding is the basic notion that where certain socially harmful products are marketed or advertised, no exacting empirical proof is required. Where, for example, alcohol marketing is involved, the government need not remain hopelessly idle in combatting the social ills associated with this product until proof of certainty is tendered. Clearly, when it comes to products such as alcohol, *Central Hudson* and its progeny do not require an empirically strict showing. A constitutionally reasonable or sound link will suffice. *Metromedia*, 435 U.S. at 509 (plurality opinion).

The Tenth Circuit erred in holding that the government's primary reliance on anecdotal evidence was insufficient under this Court's holding in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). In *Edenfield*, this Court struck down a Florida ban on CPA solicitation where the government presented "no studies that suggest personal solicitation . . . creates the dangers . . . the

[23] The Tenth Circuit itself held in a related case that "prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the [alcoholic beverage industry] is based on the belief that advertising increases sales." *Telecasters*, 699 F.2d at 501.

Board claims to fear, *nor even anecdotal evidence that validates the Board's supposition.*" *Id.* at 1800 (emphasis added). Thus, under *Edenfield*, this Court suggested that anecdotal evidence alone may be sufficient to validate certain prohibitions of commercial speech.[24]

The Tenth Circuit also mischaracterized the nature of the evidence the government relied on to find that the prohibition on alcohol content disclosure directly advances the government's interest in discouraging strength wars among beer producers. BATF did not offer only "inferential arguments based on mere speculation and conjecture," as the Tenth Circuit alleged. *Coors II*, 2 F.3d at 359. Rather, the government presented testimony and documentary information justifying its position. Relying on its institutional expertise and experience in this area of regulation, BATF concluded that a ban on alcohol content disclosure would directly advance the government's interest in discouraging strength wars.

Where an agency has found "implied claims based solely on its own intuitive reading of the advertisements, it is unnecessary to resort to extrinsic evidence." *Kraft v. FTC*, 970 F.2d 311, 315 (7th Cir. 1992). In *Kraft*, the Seventh Circuit found that the government could order the cessation of commercial speech that a government agency, based on its own expertise, found to be unfair and deceptive. The Seventh Circuit stated: "extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to make its finding." *Id.* at 320 (quoting *Colgate-Palmolive v. FTC*, 380 U.S. 374, at 391-2 (1965) (The FTC need not conduct a consumer survey in finding a commercial misleading); *Zauderer*, 471 U.S. at 652-53 (Implied claims that are self-evi-

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[24] The lower courts have correctly interpreted *Edenfield* in this manner. *See, e.g. New York State Association of Realtors, Inc. v. Shaffer*, 833 F. Supp. 165, 179 (E.D. N.Y. 1993) (quoting *Edenfield*, 113 S. Ct at 1800).



dent do not require the State to conduct a public survey before finding an advertisement misleading).[25]

2. *A new "horsepower race" has started since the Tenth Circuit's decision.*

The government's interest in this case is to prevent "horsepower races" among brewers that would contribute to alcohol abuse. Section 5(e)(2) of the FAAA has helped discourage this kind of competition for over fifty years. This, by itself, is a strong indication that the law has directly advanced the intended governmental purpose.

Not surprisingly, since the Tenth Circuit's decision in this case (and the issuance of the Bureau of Alcohol, Tobacco and Firearms' April 1993 Interim Rule responding to the Tenth Circuit's order to permit alcohol content labeling)[26] a new strength war has started. In late 1993, several major brewers began marketing a new product, "ice beer." Because the recipe for making these beers involves removing ice crystals at the end of production, most of these beers end up containing approximately 15% more alcohol than ordinary beers.

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[25] *See also Thompson Medical Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); ("In determining the meaning likely to be conveyed by advertisements ... the [agency] may rely on its own reasoned analysis of the advertisements themselves, without resorting to surveys or consumer testimony." *Id.* at 197); *National Bankers Services, Inc v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40-41 (D.C. Cir. 1985) (Court rejects Appellant's contention that a consumer survey must be provided as evidence of consumer perception); *Bristol-Myers, Co. v. FTC*, 738 F.2d 554 (2nd Cir. 1984) (In interpreting [aspirin] advertisements the FTC may rely on its own expertise in this area and need not resort to surveys and consumer testimony"); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (1944) (Commission could decide for itself whether the advertisement was deceptive without requiring a public opinion poll regarding an ad).

[26] *See* Alcoholic Content Labeling for Malt Beverages, 58 Fed. Reg. 21,228 (1993) (to be codified at 27 C.F.R. Part 7).

Brewers have been quick to tout the enhanced alcohol content of ice beers. One industry analyst noted that "[t]he brewers are counting on that extra kick to bring some excitement to a stagnant market."[27] In a trade magazine interview, Pabst Brewing Company Chairman Lutz Issleib characterized the marketing plan for his company's ice beer product as he recounted a visit to a retail store:

> I saw this big stack of Bud Ice, and I said, "Boy, this is beautiful stacking." He [the store manager] said, "Yeah, but it ain't moving." And I asked, "Well, what's moving?" And he said, "The Molson Ice that's over here." I asked "Why?" He pulled out a can and said, "Because it's got that there." The alcohol content. So I immediately called Milwaukee and said, Add the alcohol! Let's beef it up. They got 5.65 [% alcohol by volume], so mine is 5.7. . . . .[28]

This sudden outbreak of beer "strength wars" as soon as alcohol content labeling became permissible is a strong indication that the law, as it previously stood, has directly advanced the intended governmental purpose. The Tenth Circuit was thus incorrect when it stated that ". . .brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations . . . ." *Coors II*, 2 F.3d at 359. To let this prohibition permanently fall would simply open the door wider to the irresponsible marketing of beer on the basis of alcohol content. In both *Telecasters* and in this case, a legislative body sought to reduce alcohol abuse by limiting commercial statements relating to alcoholic beverages. This approach was upheld by the Tenth Circuit in *Telecasters* and it should be upheld here.

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[27] Hannon, *On Tap Soon 'Ice Beers'*, U.S. News & World Rep't, Nov. 15, 1993 (*quoting* Michael Bellas, president of Beverage Marketing).

[28] Allan, *Beer Maverick Lutz Issleib Takes On Conventional Sales Tactics*, Impact, Dec. 1, 1993, at 5 (*quoting* Lutz Issleib, Chairman, Pabst Brewing Company).



### C. There is a Reasonable Fit Between the Regulation of Alcohol Content Labeling and the Governmental Interest Served.

The Tenth Circuit stated that it needn't discuss the fourth prong of the *Central Hudson* test because it found that the prohibition on alcohol content labeling was impermissible under the third prong of *Central Hudson*. The Tenth Circuit should have found, however, that Section 205(e)(2) of the FAAA meets the requirements of both the third and fourth prongs of the *Central Hudson* test.

This Court has ruled that a prohibition of commercial speech requires a "'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is 'in proportion' to the interest served." *Fox*, 492 U.S. at 480. The interest to be served by the FAAA is the protection of the public's health and the prevention of unfair competition. Prohibiting disclosure of alcohol content is certainly a reasonable and effective way of preventing such irresponsible, unfair trade practices.

We recognize that the current regulatory scheme as embodied in the FAAA is not without flaws. Ideally, we would hope that Congress would enact legislation requiring that labels fully and completely inform consumers about the alcohol content of all alcoholic beverages including wine and distilled spirits. Such information would consist not of the half-truths that Coors claims is its constitutional right to list on labeling, but rather of full and complete information that accurately informs consumers as to the actual alcohol content of typical *servings* of beer, wine and liquor.

The judicial forum, though, is not the proper venue for Coors to attempt to change the regulation of alcohol content labeling.[29] Rather, this step will require Congress to enact legislation that standardizes alcohol content measurement for all forms of alcoholic beverages and requires disclosure of such information to be made in conjunction with warning statements on labels that convey the dangers of excessive alcohol consumption.[30] However, the fact that Congress has not yet enacted this precise type of legislation does not mean that the current prohibition on alcohol content labeling is constitutionally invalid. On the contrary, the prohibition directly advances the government's objective to prevent irresponsible, unfair competition based on alcohol content, problems that have already been exacerbated by the Tenth Circuit's decision.

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[29] The issue before this Court is whether the prohibition of alcohol content labeling directly advances the government's objective of discouraging strength wars. The Fifth Circuit held that "the relationship between advertising and consumption is a legislative and not an adjudicative fact." *Dunagin*, 718 F.2d at 748. The determination of such a relationship involves societal factors and events which may have some empirical statistics, but it is ultimately a question of reasoning and opinion. That reasoning is the responsibility of legislators, subject to information and suggestions from experts and social scientists. *See Metromedia*, 453 U.S. 490 (1981) (The decision of whether billboards divert drivers' attention and whether this causes highway accidents is a legislative decision, not judicial); *Telecasters*, 699 F.2d at 500.

[30] Since November 18, 1989, the labels of all alcohol products must bear the following warning:

> GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

27 U.S.C. § 215.



## III. THE TENTH CIRCUIT'S ERRONEOUS DECISION THREATENS OTHER ESSENTIAL FEDERAL AND STATE CONSUMER PROTECTION LAWS.

A number of consumer protection laws and regulations at the federal and state levels prohibit words or phrases used in marketing. Regulated industries may challenge all of these laws and regulations if this Court fails to overturn the Tenth Circuit's decision.

For example, the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (1990), 21 U.S.C. § 403(r) requires the Food and Drug Administration (FDA) to prohibit numerous health and nutrition claims on food labeling. Thus, under the NLEA, a food company cannot state on the front of a food label that the product has "90 calories per serving" even though the statement is true. 21 CFR § 101.13(i)(2). Such regulations further the FDA's goal of creating a limited lexicon of nutrition terminology that consumers can learn to rely on for standardized information about the nutritional value of various foods. The FDA's regulations under the NLEA constitute an important public health measure because they assist consumers in making more healthful dietary choices.[31]

An example of the type of state consumer protection laws threatened by the position advocated by Coors is the Texas legislature's prohibition of *any* use of the word "notario publico" in advertising by a notary public. Tex. Gov't Code Ann. § 406.017(c). Although "notario publico" is a literal and truthful translation into Spanish of "notary public," the term is inherently

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[31] FDA estimates that these food labeling reforms will reduce the risk of heart disease and cancer by 39,000 cases and save billions of dollars in health-care costs over a 20-year period. 56 Fed. Reg. 60,856, 60,857 (November 27, 1991) (proposed rule). The United States Department of Agriculture has promulgated similar regulations for the labeling of meat and poultry products. See 9 CFR Parts 317 and 381.

deceptive because in Mexico a "notario publico" is a licensed attorney. Thus, the Texas legislature determined that the term "notario publico" is so intrinsically deceptive that its use by a notary public who chooses to advertise in Spanish must be prohibited absolutely.

If this Court adopts the Tenth Circuit's interpretation of the First Amendment, then regulated industries may argue that these laws, and others like them, are unconstitutional. As can be seen, however, such laws serve essential purposes by prohibiting the use of terms that interfere with the advancement of important governmental interests.

## CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit should be overturned and section 205(e)(2) of the FAAA should be declared constitutional.

Respectfully submitted,

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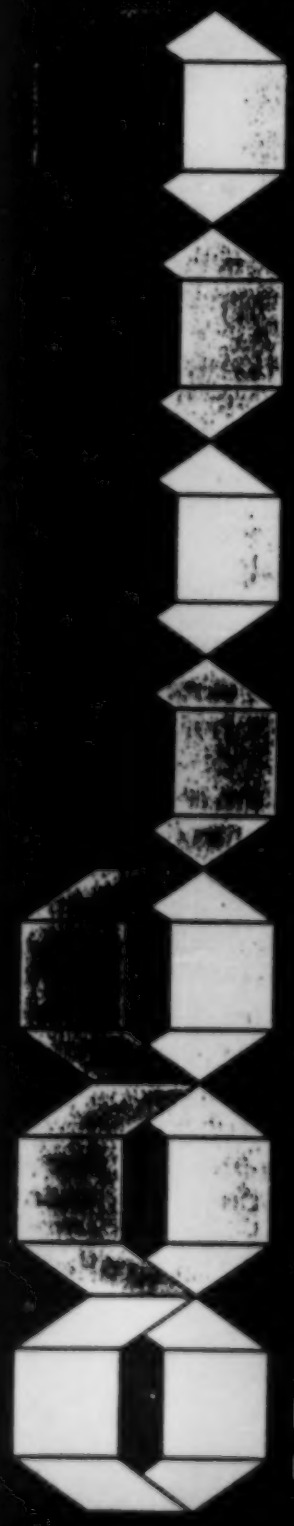
August 5, 1994

Nutrition and Your Health:

# Dietary Guidelines for Americans



Eat a variety of foods page 5

Maintain healthy weight page 8

Choose a diet low in fat, saturated fat, and cholesterol page 13

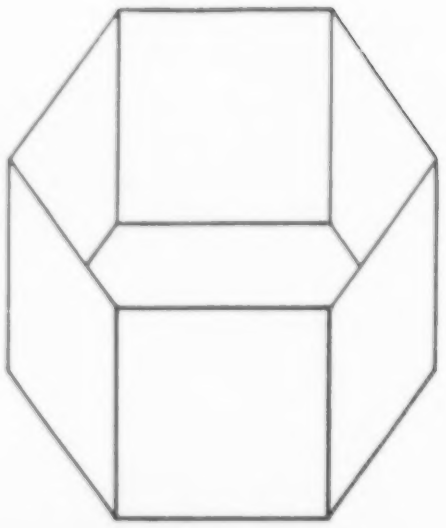
Choose a diet with plenty of vegetables, fruits, and grain products page 18

Use sugars only in moderation page 21

Use salt and sodium only in moderation page 23

If you drink alcoholic beverages, do so in moderation page 25

Third Edition 1990
U.S. Department of Agriculture
U.S. Department of Health and Human Services



# If You Drink Alcoholic Beverages, Do So in Moderation

Alcoholic beverages supply calories but little or no nutrients. Drinking them has no net health benefit, is linked with many health problems, is the cause of many accidents, and can lead to addiction. Their consumption is not recommended. If adults elect to drink alcoholic beverages, they should consume them in moderate amounts (see box on page 26).

Some people should **not** drink alcoholic beverages:

- **Women who are pregnant or trying to conceive.** Major birth defects have been attributed to heavy drinking by the mother while pregnant. Women who are pregnant or trying to conceive should not drink alcoholic beverages. However, there is no conclusive evidence that an occasional drink is harmful.
- **Individuals who plan to drive or engage in other activities that require attention or skill.** Most people retain some alcohol in the blood 3 to 5 hours after even moderate drinking.

- **Individuals using medicines, even over-the-counter kinds.** Alcohol may affect the benefits or toxicity of medicines. Also, some medicines may increase blood alcohol levels or increase alcohol's adverse effect on the brain.
- **Individuals who cannot keep their drinking moderate.** This is a special concern for recovering alcoholics and people whose family members have alcohol problems.
- **Children and adolescents.** Use of alcoholic beverages by children and adolescents involves risks to health and other serious problems.

Heavy drinkers are often malnourished because of low food intake and poor absorption of nutrients by the body. Too much alcohol may cause cirrhosis of the liver, inflammation of the pancreas, damage to the brain and heart, and increased risk for many cancers.

Some studies have suggested that moderate drinking is linked to lower risk for heart attacks. However, drinking is also linked to higher risk for high blood pressure and hemorrhagic stroke.

**Advice for today:** If you drink alcoholic beverages, do so in moderation; and don't drive.

**WHAT'S MODERATE DRINKING?**

**Women:** No more than 1 drink a day
**Men:** No more than 2 drinks a day

Count as a drink:
- 12 ounces of regular beer
- 5 ounces of wine
- 1½ ounces of distilled spirits (80 proof)

APPENDIX B

Advertising Age, July 27, 1987

# Brewing up trouble

We find it a little hard to believe that the reason Adolph Coors Co. wants to change a law that bars brewers from listing alcohol content is so it can advertise its beer as "a beverage of moderation."

Anyone who doesn't know that Coors has less alcohol per sip than Jack Daniels isn't smart enough to read the label or the advertising anyway.

Other brewers have opposed listing of alcohol content on the basis that it might result in a race to see who can brag about more alcohol than the other guy. And that would be sure to mobilize anti-alcohol forces and those who would ban alcohol advertising.

One competitor suggests that Coors' real purpose in its court challenge of the law is to be able to show that its alcohol content is on a par with or ahead of other leading beers, to dispel Coors' image as "Colorado Kool-Aid."

That may be a legitimate marketing objective—after all, people don't drink beer just because it's wet. But with so many people concerned about alcohol abuse and ready to push for drastic legislation to curb it, we hope the court shuts off Coors' plan.

Advertising Age, July 13, 1987

# Coors fights label restriction

## Brewer wants to advertise alcohol content

By SCOTT HUME

Adolph Coors Co. says it is challenging federal labeling restrictions in an effort to advertise beer as a "beverage of moderation."

But at least one rival suggests Coors' real motivation is to combat its nagging image as "weak" beer.

Golden, Colo.-based Coors, the nation's fifth-largest brewer, filed suit July 2 in U.S. District Court in Denver, challenging the constitutionality of the Federal Alcohol Administration Act prohibition against stating alcohol content on beer labels or in advertising.

That same law requires such disclosure for distilled spirits and wines containing 14% or more alcohol by volume.

The brewer in May petitioned the Bureau of Alcohol, Tobacco & Firearms for approval to list alcohol content on packaging and in advertising. BATF turned down the request, citing the FAAA's strictures.

"If consumers are to make informed choices and act responsibly in the use of these beverages, they need the facts," said Robert Rechholtz, Coors exec VP-sales and marketing. "They need to know the actual alcohol content of malt beverages as well as wine and spirits." Noting that changing preferences have brought a decline in distilled-spirit consumption, a Coors spokeswoman added that removing restrictions on brewers' labeling "would allow us to better communicate that beer is a beverage of moderation."

Coors has offered examples of labeling and advertising that include alcohol content discussion. The proposed print ad pictures various national brands and their alcohol content under the headline "Count on Coors for the facts." Foote, Cone & Belding, Chicago, handles Coors.

The spokeswoman said alcohol contents by volume for several major brands include: Coors, 4.73%; Budweiser, 4.67%; Miller High Life, 4.53%; Miller Genuine Draft, 4.61%. For light beers: Coors Light, 4.12%; Bud Light, 3.56%; Miller Lite, 4.12%.

"The real point Coors wants to make is not that its beer is lower in alcohol than distilled spirits but that it's equal in alcohol to other beers," charged an executive with another major brewery who asked for anonymity.

"A problem that has stayed with Coors as long as any other is the perception that its beer is weak. The 'Colorado Kool-Aid' image," the executive said. "Of course, their beer isn't any weaker than any others, and they may in fact be stronger. This would be the best way to show it."

Other brewers have in the past opposed alcohol-content listing and advertising out of fear that smaller brewers would promote the strength of their brands, drawing the wrath of anti-alcohol pressure groups.

As a result, competitors are not expected to join in Coors' suit.

# Listing alcohol in beer near

## U.S. backs Coors on ad campaign

By DEBORAH GOEKEN
Rocky Mountain News Staff Writer

The Adolph Coors Co. of Golden has won what it considers an important, though initial, victory with a federal ruling that brewers be allowed to tell consumers how much alcohol is in their beer.

The U.S. Department of Justice ruled that a 52-year-old federal law prohibiting brewers from listing alcohol content information on labels and advertisements is unconstitutional.

Coors sought the ruling because it believes not listing alcoholic content puts it at a competitive disadvantage. Other alcoholic beverages list such content.

Coors sued the Treasury Department and the Bureau of Alcohol, Tobacco and Firearms three months ago in U.S. District Court in Denver. The brewer complained that the federal law violates freedom of speech guarantees contained in the First Amendment to the Constitution.

While the Justice Department said last Thursday that it will no longer enforce the statute, department lawyers asked for a 30-day period in which to notify Congress that it believes the law is unconstitutional.

Members of Congress have until Nov. 12 to intervene in the case if they oppose the Justice Department's legal interpretation.

The lawsuit is on hold pending action by Congress.

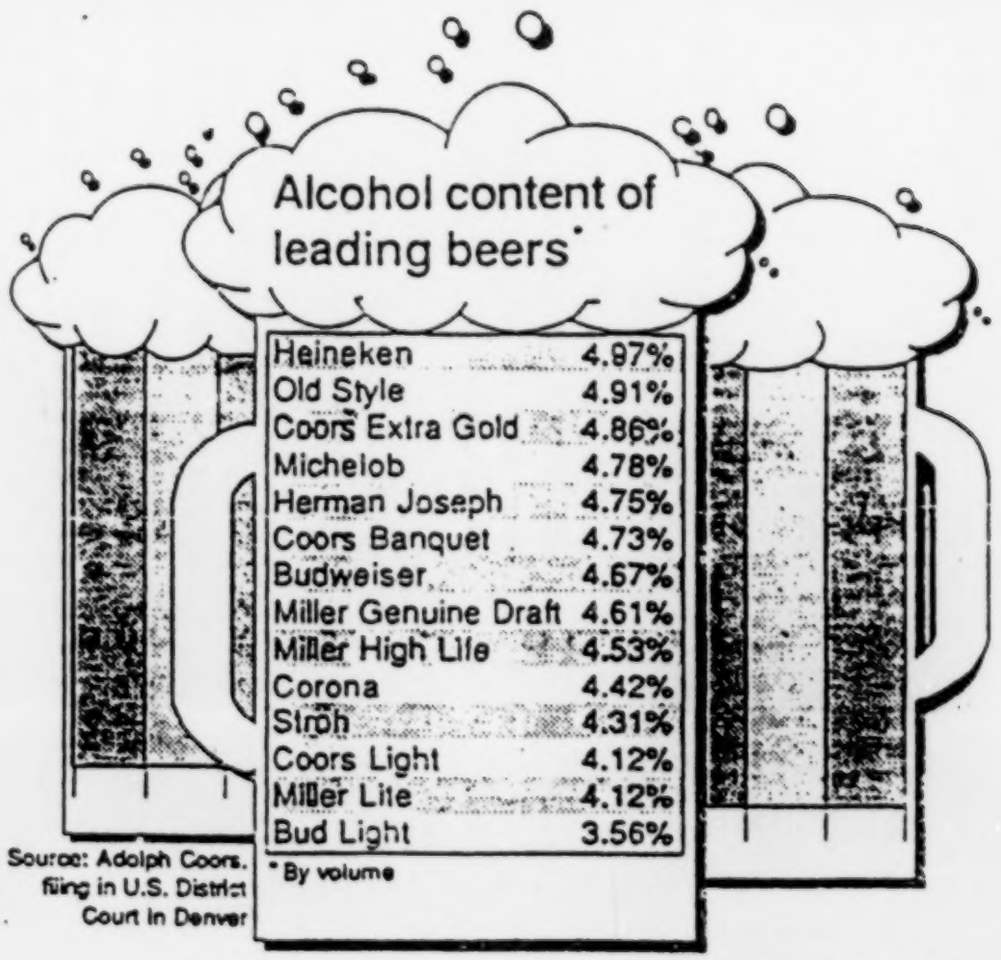
Coors has attacked the controversial statute for several reasons.

The company believes that beer-drinkers interested in moderation needs the alcohol content information in order to make intelligent decisions, said company spokeswoman Rhona Williams.

Some uninformed people choose wine instead of beer, even though wine actually has a higher alcoholic content, the company said.

Coors also wants consumers to know that its beer contains just as much alcohol as industry-leading Anheuser-Busch's products, Robert Rechholtz, executive vice president of sales and marketing, said in an earlier interview. The company worries that beer-drinkers think Coors is a less substantial beer than Budweiser, he said.

However, Coors contains more alcohol by volume than Budweiser, according to laboratory tests filed with the lawsuit. For example, Coors regular beer contains 4.73% alcohol while Budweiser contains 4.67%. Coors Light




DAVID PIERCE/Rocky Mountain News

APPENDIX D

APPENDIX E

| | | | |
|---|---|---|---|
| Program: | Howard Stern | 60 Sec. | Station: WXRK |
| Date: | June 9, 1989 | 6:00 a.m. | City: New York |

**COORS EXTRA GOLD BEER**

(MUSIC)

MAN SINGS: You know I like my beer, I like it a lot. Drink it down to the bottom. Start again at the top. It got Coors Cold Gold and this is my place and when I go for my brew, don't make me wait. I want an Extra Gold cold. Give me that full-tilt taste.

MAN: Yeah, beer drinkers, time for a little party tip. Never party with anything less than a full-tilt taste of Extra Gold. Come on, pop open a 12-ounce party.

MAN SINGS: Pour that gold and give me some space, 'cause when I'm drinking my brew I got no time to waste. Gonna taste that Extra Gold taste and pour it into my face.

MAN: Here's another tip for you. Next time it's party time, pick up the full tilt-taste of Extra Gold Draft at a store near you, or ask for it at your favorite place.

2ND MAN: Coors Brewing Company, Golden, Colorado.